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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 812

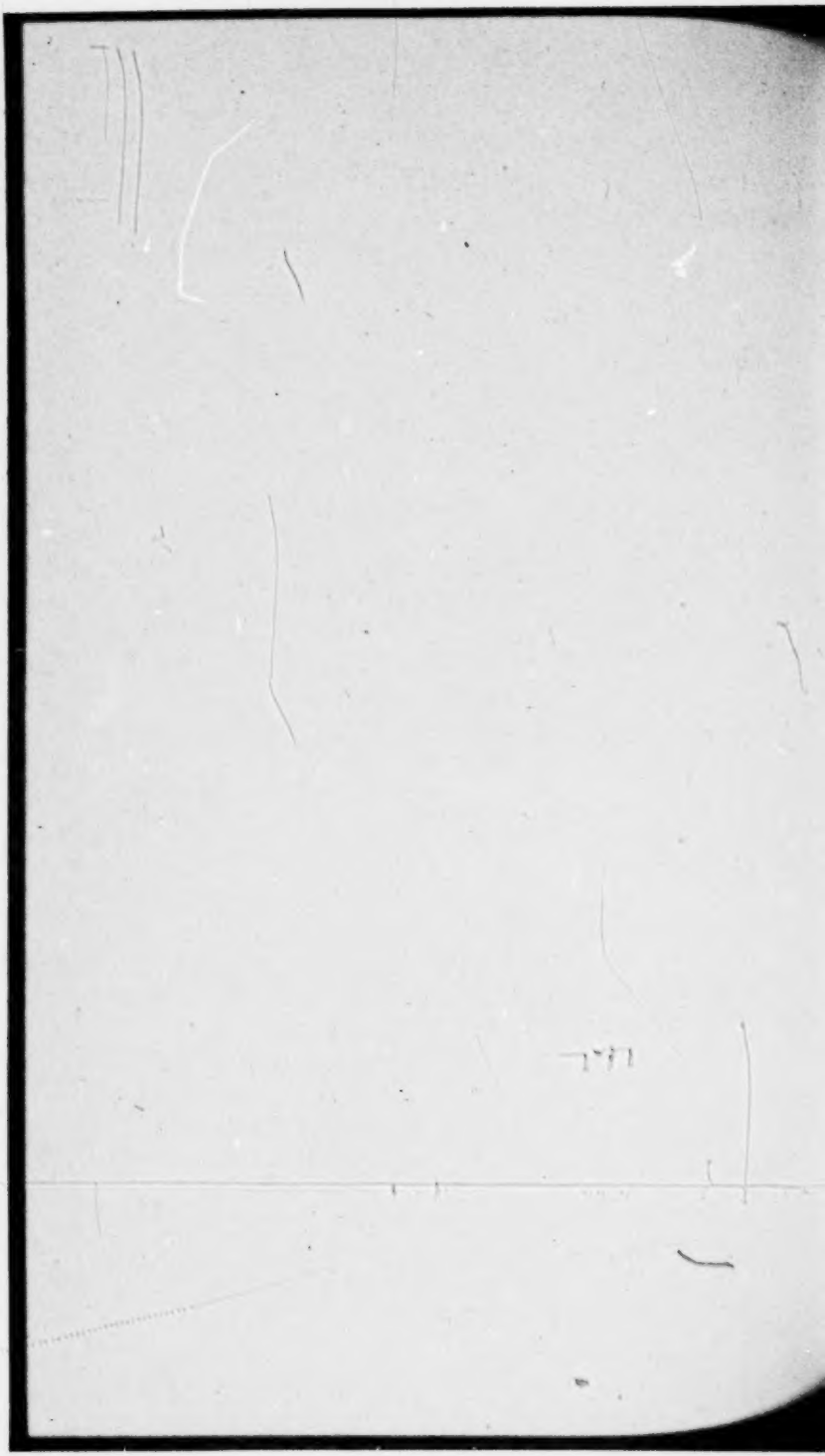
MRS. LIBBYLEI GRAVES McKEWEN,
Petitioner,

vs.

MRS. MARJORIE L. McKEWEN, AND UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GARNER W. GREEN,
ROSS R. BARNETT,
P. Z. JONES,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 812

MRS. LIBBYLEI GRAVES McKEWEN,
Petitioner,

vs.

MRS. MARJORIE L. McKEWEN, AND UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Mrs. Libbylei Graves McKewen, a citizen of the United States residing in Hinds County in Mississippi, respectfully prays that writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals, 5th Cir., entered January 23, 1948, on which petition for rehearing was denied February 23, 1948. Said Court of Appeals affirmed judgment theretofore rendered in the

United States District Court in and for the Meridian Division of the Southern District of Mississippi, in favor of Mrs. Marjorie L. McKewen, (plaintiff there) respondent here, and against Mrs. Libbylei Graves McKewen, (a defendant) petitioner here.

Summary and Statement of Matters Involved

Respondent, Mrs. Marjorie L. McKewen, sued petitioner, Mrs. Libbylei Graves McKewen and the United States of America to reform a $10,000 life insurance policy issued to an Air Corps officer under the National Service Life Insurance Act of 1940 (*38 U. S. C. A. 801, et seq.*). The officer, unmarried when first insured, designated his mother, petitioner here, as beneficiary. Thereafter, he married. He died in aerial combat over Germany on January 11, 1944. His widow asserted to the Veterans Administration, who administers said insurance act, that she was the substituted beneficiary by reason of a signed "Government Insurance Report Form" in her possession. This document with two signed "Officers' Data Sheets", which later found their way into the Veterans Administration, caused a contest as to whether there had been a substitution. The Veterans Administration waived its right to interplead the $10,000 (*38 U. S. C. A. 445*), and applied its administrative processes in search of the solution on January 13, 1946. It found that the "evidence" of the widow "does not appear sufficient" to support a change of beneficiary. It cast the widow upon her election to appeal to the Administrator of Veterans Affairs, or, file suit in the appropriate United States Court. The widow elected the latter course.

Under stipulation of parties, the District Court considered only the proof in the file of the Veterans Administration, on such proof the Court found there had been a substitution and ordered reformation accordingly.

This action of the District Court was affirmed by the Court of Appeals. *McKewen* v. *McKewen, et al.*, 165 F. 2d 761.

Jurisdiction

Decisions of the Administrator of Veterans Affairs on any question of law or fact is final and conclusive, except as to insurance. (*38 U. S. C. A. 11 a-2*). After the refusal of the Veterans Administration to award the money to her, the widow waived her right to appeal to the Administrator of Veterans Affairs, and elected to file suit and proceed on the identical proof in the District Court, her rejected claim constituting the disagreement necessary to give the District Court jurisdiction of her action to recover benefits under the policy.

38 U. S. C. A. 445; 38 U. S. C. A. 817; Leyerly v. *United States,* 10 Cir., 162 F. 79, 83.

Jurisdiction of this Court is conferred by *Section 240, Amended,* of *Judicial Code (28 U. S. C. A. 347).*

The Issue

The question present is whether the proof is sufficient to support a change of beneficiary.

Reasons Relied On for Allowance of Writ

It is respectfully submitted that:

1. The decision of the 5th Cir., here asked to be reviewed, conflicts with the decision of the 10th Cir., in *Bradley* v. *United States,* 143 F. 2d 573, (Cert. Den. 65 S. Ct. 429, 323 U. S. 793, 89 L. Ed. 632), and the conflict in the views of these two Circuits should be clarified for the future guidance of the Courts and of the Veterans Administration.

2. It is important to the families of deceased soldiers and to the Veterans Administration for this Court to declare

the judicial recognition Courts should give an administrative finding of the Veterans Administration, where such finding is based on undisputed written documents and is neither arbitrary nor capricious.

3. There should be a uniformity in the decisions relating to the facts under the National Service Life Insurance Act.

WHEREFORE, a writ of certiorari is respectfully prayed.

GARNER W. GREEN,
ROSS R. BARNETT,
P. Z. JONES,
Jackson, Mississippi,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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No. 812

MRS. LIBBYLEI GRAVES McKEWEN,
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Respondents

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Delivered

Decision of Veterans Administration (R. 41).

Decision of District Court (R. 55).

Opinion (R. 58) and order (R. 59) overruling motion for new trial.

Opinion, Court of Appeals (R. 81). 165 F. 2d 761.

Statement as to Jurisdiction of the Supreme Court of the United States

Sec. 240 (a), amended, of Judicial Code (28 U. S. C. A. 347).

The decision and judgment of the Circuit Court of Appeals were entered on January 23, 1948. The order denying petition for rehearing was entered on February 23, 1948. The time for filing petition for certiorari, supporting brief and the record ran from said last mentioned date.

Statement of the Case

The case as stated in the petition for writ of certiorari is supplemented to this extent:

The deceased officer, John W. McKewen, Jr., took out a life insurance policy under the National Service Life Insurance Act of 1940, on January 28, 1942, and his mother, Mrs. Libbylei Graves McKewen, was recorded as beneficiary therein. The certificate of the beneficiary appears in the record (R. 19).

The officer married Miss Marjorie Landes on June 25, 1943.

At an Army Air Base, at Kearney, Nebraska, on October 23, 1943, he signed an Officers' Data Sheet (R. 24), wherein, among other things, appeared:

"Person designated as beneficiary: Marjorie Landes McKewen.
Relation: Wife.
Address: 319 South Prentiss Street, Jackson, Mississippi.
Total amount Class N or D Insurance: $10,000.
Insurance Beneficiary: Marjorie Landes McKewen.
Relation: Wife."

On the same date at the same Air Base, he signed a mimeographed form styled "Government Insurance Report Form", addressed:

"To: Mrs. Marjorie L. McKewen, Jackson, Mississippi, • • • On Date of 1/28/42, I took out $10,000 in (National Service Life Insurance) (United States Government Insurance), naming you as my beneficiary."

On December 1, 1943, at an Army Air Base in England he signed another Officers' Data Sheet, wherein, among other things, appeared:

"Government Insurance—Yes. Amount: $10,000. Beneficiary: Marjorie L. McKewen."

The death of the deceased occurred on January 11, 1944.

The documents unsupported by other evidence, constitute and is the proof of respondent, Mrs. Marjorie L. McKewen, that there was a change of beneficiary.

ARGUMENT

The Proof Is Insufficient to Support a Change of Beneficiary

The opinion of the Court of Appeals (R. 85) states:

> "It is true that nowhere in the record does there appear any written request by the insured to the Veterans Administration, nor any statement by him to anyone, that he had 'changed the beneficiary' of his insurance, but there are three official documents executed by the insured—for the information of his Government (the insurer), his widow, and whomsoever else into whose hands the documents might come in due course, stating that his wife was the beneficiary. Although his mother was initially the beneficiary, nevertheless he on three later occasions stated in writing that he had made his wife the beneficiary, and for us now to say that in these documents there was no state-

ment indicating that he had 'changed the beneficiary' is to look at form and to overlook substance".

This conflicts with the conclusion reached in the opinion of *Bradley* v. *United States,* 143 F. 2d 573, 577.

> "There is nothing in the confidential reports or the evidence in this case from which it can be legitimately inferred that it was intended for the use and information of the Veterans' Administration, or that its purpose was to effect a change of beneficiary under the life insurance policy. The administration was a total stranger to the report, and did not receive it or have knowledge of its execution until after the death of the insured, and it was forwarded to the administration upon its request. It is not a notice of any kind, it is not a direction that the name of the beneficiary be changed, and does not express or indicate even indirectly or inaptly a desire to have the beneficiary changed. Indeed, it is not a voluntary expression of any wish, desire or intention. At most it indicates a belief or understanding that his wife was the then present beneficiary. When given its most liberal construction in the light of all the facts and circumstances, we are convinced that it cannot be treated as an effectuation of the insured's intention to change his beneficiary."

Certiorari Denied *65 S. Ct. 429; 323 U. S. 793; 89 L. Ed. 632.*

The cases under the National Service Life Insurance Act relating to change of beneficiary recognize the well established principles that:

The burden of proof is upon the one claiming to be substituted beneficiary;

The deceased was required to do everything reasonably within his power to accomplish the change (leaving only ministerial acts to be performed by the insurer);

The principles which actuate a Court in giving effect to the ascertained intentions of the insured have application only where the party has attempted to act for himself;

A mere intent, without an overt act, is insufficient; and,

The insurer's rules and regulations are for the insurer's benefit and can be waived by it.

These principles were recognized in the Court of Appeals in the case at bar, but erroneously applied to the proof herein:

Compare the cases where the proof was held insufficient, with the cases where the proof was held sufficient:

The proof was insufficient in:

Bradley v. *United States,* 143 F. 2d 573, Cert. Den. 65 S. Ct. 429, 323 U. S. 793, 89 L. Ed. 632;
Ramsey v. *United States,* 72 F. Supp. 613.

The proof was sufficient in:

Roberts v. *United States et al.,* 4 Cir., 157 F. 2d 906, Cert. Den. 67 S. Ct. 870, 330 U. S. 829, 91 L. Ed. 1278;
Mitchell v. *United States,* 72 F. Supp. 352; 165 F. 2d 758, (5 Cir.);
Collins v. *United States,* 10 Cir., 161 F. 2d 64, Cert. Den. 67 S. Ct. 1756, 331 U. S. 859, 91 L. Ed. 1866;
Citron v. *United States,* 69 F. Supp. 830;
Woods v. *United States,* 69 F. Supp. 760;
Van Doren v. *United States,* 68 F. Supp. 222;
Walker v. *United States,* 70 F. Supp. 422;
Eggleston v. *United States,* 71 F. Supp. 114.

We respectfully submit there is no evidence at all, competent or otherwise, that the three documents were official documents of the War Department, or of the Veterans Administration.

The Court of Appeals invoked Rule 52 of the Federal Rules of Civil Procedure in affirming the judgment of the District Court.

Rule 52 has no application, for the case here was not tried upon facts, but tried upon the pleadings and stipulation of undisputed documents.

Where the facts are not in dispute, inferences and conclusions drawn by the trial court are not binding on the appellate court, which remains free to draw inferences and conclusions which, in its opinion, the findings reasonably induce.

Kuhn v. *Princess Lida of Thurn & Taxis,* 3 Cir., 119 F. 2d 704; *Adams County* v. *Northern Pac. Ry. Co.,* 9 Cir., 115 F. 2d 768, 779; *Carter Oil* v. *McQuigg,* 7 Cir., 112 F. 2d 265, 279; *Stubbs* v. *Fulton National Bank of Atlanta,* 146 F. 558, (Cert. Den. 65 S. Ct. 1202, 325 U. S. 864, 89 L. Ed. 1984).

The Administrative Finding of Facts Should Be Final Because It Is Reasonable and Just and Is Not Capricious and Is Based On Substantial Evidence.

The Administrative Procedure of the Veterans Administration is fully set forth in Part II, Sen. Doc. 186, 76 Cong. 3rd Ses. on Administrative Procedure in Government Agencies.

The functions of the adjudicatory group administering insurance appears on Pages 54-57, inclusive, of said monograph, and were followed in the case at bar.

38 U. S. C. A. 808, as it was prior to the 1946 amendment, provided that all decisions of the Administrator under the provisions of the Chapter relating to the National Service Life Insurance Act, and Regulations issued pursuant thereto, were final and conclusive, except as to disagreements provided for in Section 817.

Courts must assume responsibility for the construction of the National Service Life Insurance Act. *Zazove* v. *U. S.,* 156 F. 2d 24.

The Veterans Administration may not adjudicate the question whether a valid change of beneficiary has been effected in accordance with the prescribed means and method which is the legal standard for that purpose. *Bradley* v. *U. S.*, 143 F. 2d 573, 577.

But, the Veterans Administration here applied no legal standards in finding the facts from undisputed evidence.

Decision of the Veterans Administration was reached in this case on January 12, 1946 (Item 23, R. 41). *Bradley* v. *U. S.*, *supra*, was decided May 30, 1944.

The doctrine of administrative finality is the doctrine under the separation of powers by which the judicial sphere of Government accords certain finality to the acts of agencies of the Legislature on matters within the constitutional power of the Legislature. Congress may not delegate the power to make law, but it may delegate to an administrative agent the power to determine matters of a factual nature to which the law declared by Congress is to apply. Since the power to determine such factual matters is within the Legislative sphere of Government, the doctrine of administrative finality is the broad rule that the determination of any such factual matter by the administrative agent of the Legislature is final so long as a rational basis can be found for the determination. Specifically, the doctrine of administrative finality is the aggregate of the rules that the finding of an administrative agency on such a factual matter is conclusive upon a reviewing Court when it is supported by substantial evidence, and the weighing of evidence, the credibility of witnesses and the drawing of inferences from evidence, are all matters for the agency, not the reviewing Court. However, questions of law that are raised are to be decided in the independent judgment of the reviewing Court. They are judicial, not administrative questions, although in deciding them the reviewing

Court will accord weight or great weight to an experienced judgment expressed by the agency.

The following cases apply the doctrine of administrative finality:

Veterans Administration (on administrative questions). *U. S.* v. *Williams,* 278 U. S. 271, 73 L. Ed. 314, 49 S. Ct. 97; *Meadows* v. *U. S.,* 281 U. S. 271, 74 L. Ed. 852, 50 S. Ct. 279; *Silberschien* v. *U. S.,* 266 U. S. 221, 225, 45 S. Ct. 69, 69 L. Ed. 256.

Tax Court. Comr. of Internal Rev. v. *Sunnen,* No. 227, October 1947 Term, U. S. S. Ct., decided April 5, 1948.

Federal Trade Commission. Federal Trade Comm. v. *Cement Institute,* No. 23, October 1947 Term, U. S. S. Ct., decided April 26, 1948; *Gulf Oil Corp.* v. *F. T. C.,* 150 F. 2d 106.

Alien Cases. Bridges v. *Wixon,* 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443.

Interstate Commerce Commission. R. F. C. v. *Denver & R. G. W. R. Co.,* 328 U. S. 495, 90 L. Ed. 1400, 66 S. Ct. 1282.

Federal Power Commission. Conn. Light & Power Co. v. *Fed. Power Comm.,* 324 U. S. 515, 89 L. Ed. 1150, 65 S. Ct. 749.

National Labor Relations Board. Natl. Labor Relations Board v. *Hearst Publications,* 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851.

Railroad Retirement Board. Utah Copper Co. v. *R. R. Retirement Board,* 129 F. 2d 358 (Cert. Den. 317 U. S. 687, 87 L. Ed. 550, 63 S. Ct. 258).

Securities and Exchange Commission. Securities and Exchange Comm. v. *Chenery Corp.,* 318 U. S. 80, 87 L. Ed. 626, 63 S. Ct. 454.

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Tax Court. Commr. of Internal Rev. v. *Flowers,* 326 U. S. 465, 90 L. Ed. 203, 66 S. Ct. 250.

Director of the Bituminous Coal Division. Indianapolis v. *Wheeler,* 132 F. 2d 879 (Cert. Den. 318 U. S. 781, 87 L. Ed. 1149, 63 S. Ct. 859).

State Agencies. Arkansas Corp. Comm. v. *Thompson,* 313 U. S. 132, 85 L. Ed. 1244, 61 S. Ct. 888.

Mr. Chief Justice Stone in *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 681, 88 L. Ed. 1007, 64 S. Ct. 830, said:

> "It has long been settled that findings of the board, *as with those of other administrative agencies,* are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the board and not the courts, that the inferences from the evidence are to be drawn by the board and not the courts, save only as questions of law are raised and that upon such questions of law the experienced judgment of the board is entitled to great weight". (Italics ours.)

It is respectfully submitted that this case calls for the exercise by this Court of its supervisory powers, and that this Court should grant said petition for a writ of certiorari herein, directing said Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in this cause to this Court, so that this Court may review and act thereon as of right and according to law, and as ought to be done.

Respectfully submitted,

GARNER W. GREEN,
ROSS R. BARNETT,
P. Z. JONES,
Jackson, Mississippi,
Counsel for Petitioner.

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No. 812

MRS. LIBBYLEI GRAVES McKEWEN,

Appellant,

versus

MRS. MARJORIE L. McKEWEN and UNITED STATES OF AMERICA,

Appellees.

RESPONSE TO MOTION TO DISPENSE WITH CERTAIN DESIGNATED ITEMS OF PROOF IN THE PRINTED RECORD, ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND REPLY BRIEF IN SUPPORT THEREOF.

S. M. GRAHAM,
Attorney for Mrs. Marjorie L. McKewen, Appellee.

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

MRS. LIBBYLEI GRAVES McKEWEN,
Appellant,

versus

MRS. MARJORIE L. McKEWEN and UNITED STATES OF AMERICA,
Appellees.

RESPONSE TO MOTION TO DISPENSE WITH CERTAIN DESIGNATED ITEMS OF PROOF IN THE PRINTED RECORD.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

On the hearing in the District Court, there were 87 documents taken from the Veterans' Administration record and stipulated by written agreement of counsel as constituting the facts on which the cause was submitted to the District Court. On appeal to the Circuit Court of the Fifth Circuit, the stipulation agreement by counsel in writing reduced the number of such documents from 87 to 34 to be included in the record to the Circuit Court of Appeals, all of which occupy only 46 short pages in the printed record to the Circuit Court of Appeals, 10 copies of which are now on file in this court.

We see no undue burden in printing this short record, especially, when to do so, would deprive this Court and the respondent of much vital and material evidence.

Item 29, page 64, is the marriage license of the respondent to the deceased insured, to eliminate which, would disqualify the respondent as a member of a class eligible as beneficiaries of National Service Life Insurance.

Item 26, page 50, and Item 27, page 53, are two letters from the United States Justice Department to the United States District Attorney handling the litigation in which the applicable regulations and laws are set forth and construed as well as the contentions of appellant.

Item 22, page 40, contains all the evidence of oral expressions of intention and desire by the deceased insured with reference to the beneficiary of his insurance.

Item 20, page 39, is an admission that the signature of the deceased insured on the documents changing his beneficiary was compared by the Veterans' Administration with the original signature on the application for the insurance, and that the signature was genuine. Verification of the signature being made necessary by the appellant denying the signature of the deceased insured to the documents changing his insurance beneficiary.

Item 15, page 35, is letter from Veterans' Administration to the Adjutant General of the War Department, advising receipt of certified copies of the Government Insurance Report form and Officer's Data Sheet, from Kearney, Neb., which the Veterans' Bureau proposed to accept but that the mother, appellant, had questioned the signatures of said documents and asked the War Department to forward the application for insurance for the purpose of comparing signature of deceased insured on the Government Insurance Report Form and Officer's

Data Sheet with that on the original application for the insurance.

We think that this attitude of the appellant, mother, is very material because if she had not considered these documents as sufficient to change the beneficiary of the insurance in question, she would have had no purpose in denying the signature thereon.

Item 30, page 66, is letter from the Veterans' Administration to the appellant mother, which in our opinion is most vital and material, because, it admits the right of deceased insured to change his beneficiary of his insurance at any time without the knowledge or consent of the original beneficiary, and admits possession of documents over the signature of deceased insured in which his expressed wishes were set forth and which must be accepted as binding upon the Veterans' Administration, giving the mother the privilege of furnishing any information in her possession dated subsequent to October 20, 1943 (date on which said documents were executed) over the signature of the deceased insured, in which he had expressed an intention contrary to that as outlined above.

Item 31, page 67, is letter from Veterans' Administration admitting that the beneficiary of the policy in suit had been changed from the mother, appellant, to the respondent.

Item 32, page 68, is letter from the mother appellant to the Director of Insurance of the Veterans' Administration protesting its act of accepting the change of beneficiaries, which protest now seems to be without merit, yet, according to the opinion of the Circuit Court of Appeals, (R-83), 165 F. 2nd 761, it caused the suspen-

sion of further payments to the widow and respondent under the award made to her, and so, has become a part of this case and should not be eliminated.

Item 33, page 69, is letter of disagreement, without which the Court is without jurisdiction.

Item 34, page 70, is letter from the Veterans' Administration to opposing counsel after this suit was filed, in which it is admitted that the change of beneficiary by the deceased insured from his mother to his wife, widow and respondent, was normal and logical.

So that this record having been considered by the District Court and Circuit Court of Appeals has become so scrambled as to be impractical to attempt at this late date to unscramble.

We humbly submit that the record as agreed upon twice by counsel should not at this later date be mutilated.

S. M. GRAHAM,
Attorney for the Respondent.

I, S. M. Graham, counsel for respondent, Mrs. Marjorie L. McKewen, certify that a true copy of the foregoing reply to appellant's motion has been mailed to Barnett, Barnett & Jones and Garner W. Green, attorneys for movant, to their usual place of abode and address, with sufficient postage attached thereto, properly addressed and delivered to the United States mail on this the .... day of ....., 1948.

S. M. GRAHAM,
Attorney for the Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES

No.

MRS. LIBBYLEI GRAVES McKEWEN,
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MRS. MARJORIE L. McKEWEN and UNITED STATES OF AMERICA,
Appellees.

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND REPLY BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Since the statement of the proceedings as to the parties, their relation, and the action of the courts, and the issue involved are sufficient for the purpose of considering this petition, and for the sake of brevity, we will avoid further statement.

Rule 38, paragraph 5, provides that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. We earnestly urge that there are no special or important reasons for allowing the writ in the case at bar.

1. Petitioners have limited their right and reason for the writ to that set out in the first sentence of Rule 38, par. 5b "where the Circuit Court of Appeals has ren-

dered a decision in conflict with the decision of another circuit court of appeals on the same matter". Counsel contends that the decision of the Fifth Circuit, here asked to be reviewed, conflicts with the decision of the Tenth Circuit, in *Bradley vs. United States*, 143 F. 2nd 573 (cert. den. 65s, C. T. 429, 323 U. S. 793, 89 L. Ed. 632) and allege that this conflict in views of these two circuits should be clarified for the future guidance of the courts and of the Veterans' Administration.

1. We positively deny that there is a conflict in these two decisions or that the courts or the Veterans' Administration have been, or are likely to be mislead or confused by this alleged conflict.

2. We deny that this court can declare in the case at bar what the judicial recognition courts should give an administrative finding of the Veterans' Administration.

3. We deny that there is any lack of uniformity in the decisions relating to the facts under the National Service Life Insurance Act, or the facts in the case at bar.

S. M. GRAHAM,
Attorney for Respondent.

I, S. M. Graham, counsel for respondent, Mrs. Marjorie L. McKewen, certify that a true copy of the foregoing answer of respondent to petition for writ has been mailed to Barnett, Barnett & Jones and Garner W. Green, attorneys for movant, to their usual place of abode and address, with sufficient postage attached thereto, properly addressed and delivered to the United States mail on this the .... day of ....., 1948.

S. M. GRAHAM,
Attorney for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES

No.

MRS. LIBBYLEI GRAVES McKEWEN,
Petitioner,

versus

MRS. MARJORIE L. McKEWEN and UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS DELIVERED.

In addition to the opinions listed in counsel's brief, we add the decision of the Veterans' Administration making award to the respondent and appellee as appears from Item 16, (R-37), Item 25, (R-50), opinion of the Circuit Court of Appeals in the case at bar, (R-83), 165 F. 2nd 761.

STATEMENT AS TO JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

The manadate from the Circuit Court of Appeals dated March 24, 1948, was filed by the Clerk of the District Court, where the case at bar was tried, March 25, 1948, and the mandate has never been recalled by the Circuit Court of Appeals issuing the mandate, and no order for a stay or a recall of the mandate has been requested by opposing counsel at the time they petitioned this court for the issuance of a writ to the Circuit Court of Appeals.

REPLY BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

The *Bradley* case, *supra,* decided by the Tenth Circuit Court of Appeals on May 30, 1944, decided that the mere intention of an insured to change his beneficiary in a National Service Life Insurance contract was insufficient to effect such change, and that a confidential record required of a soldier by the War Department, which was not intended for the Veterans' Administration and to which the Veterans' Administration was a stranger, but intended only for the War Department, and not having any reference to the change of beneficiary in any insurance, did not constitute an overt act by the insured to change his insurance beneficiary. It holds that all formalities and technicalities should be brushed aside by the courts in an effort to carry out the wishes of the soldier, where the soldier intended to change his beneficiary and made an overt effort to change it, leaving

only ministerial acts to be performed by the insurer. This holding, as I understand the law, is in harmony with the universal holdings of the District Courts and Circuit Courts of Appeal.

The trouble with counsel's reasoning is that he attempts to place a document executed by the insured dealing solely with matters of insurance in the same category with a confidential document executed for other purposes.

As evidence that there is no conflict between the Fifth and Tenth Circuits is the fact that the Tenth Circuit came along over three years later and on June 23, 1947, decided the case of *Collins vs. United States, et al.*, 161 F. 2nd 64, cert. den. 67 S. Ct. 1756, 331 U. S. 859, 91 L. Ed. 1866, in which the opinion rendered therein by the Tenth Circuit was not only in perfect accord with the cases of *Mitchell vs. United States, et al.*, 165 F. 2nd 758, and the case at bar in 165 F. 2nd 761 by the Fifth Circuit Court of Appeals, but the Tenth Circuit *actually reversed the District Court for following the Bradley case, supra,* and held as a matter of law that because the facts in the two cases were different, *that there was no conflict between the Bradley and Collins cases, supra,* and consequently, between the *Bradley* and *McKewen* cases *supra,* and since the Tenth Circuit Court of Appeals, by its own adjudication, has held that there is no conflict in its holdings, it is tantamount to holding that there is no conflict between the law as announced by the Tenth Circuit Court of Appeals, and that announced by the Fifth Circuit Court of Appeals, and so,

it follows, that there is no reason for the issuance of any writ of certiorari by this court to clarify an alleged conflict when none exists.

As for the importance of this court declaring the judicial recognition courts should give an administrative finding of the Veterans' Administration, we submit that this court would have to deny the writ, or if allowed, to affirm the case, because of the fact, that, in the case at bar, the Veterans' Administration awarded this insurance to the widow and respondent herein, and actually paid her under that award the sum of $935.60, Item 16, (R-37), and Item 21 (R-40).

In response to counsel's contention that an award was made to the original beneficiary and appellant, and that same should be final and binding on this court, we wish to call the court's attention to paragraph 6 of the Answer of the United States filed August 21, 1946, in the District Court at Meridian, Mississippi (R-10), which says:

> "Defendant admits the allegations of paragraph 8 of plaintiff's complaint, except to deny that the benefits of the deceased veteran's $10,000 National Service Life Insurance policy have been awarded or paid thus far to the insured's mother, Mrs. Libbylei Graves McKewen, and answering further defendant alleges no further payments of insurance benefits will be awarded or paid on the policy in suit pending final disposition of this action."

If an award had been made to the appellant mother, it was also awarded to the widow and respondent, so that the court in this case, could not hold that either award was final.

We submit that there is uniformity in the decisions relating to the facts under the National Service Life Insurance Act, and as evidence of that fact the case of *Claffy vs. Forbes,* 280 F. 233, from the District Court of the Western Division of Washington, decided way back in April, 1922, has been quoted at great length and cited with approval by the majority of the Circuit Courts of Appeal, as well as by any number of District Courts ever since that opinion was rendered right down to the present day, as we find in the opinion in the case at bar on (Record 83).

It is interesting to note a listing of cases in counsel's brief in which the facts supporting a change of beneficiary in the National Service Life Insurance policy were insufficient to effect a change, and a listing of cases in which the facts were held to be sufficient to show a change of beneficiary, which we adopt as representing the overwhelming weight of authority.

In the cases where the proof was insufficient to effect a change of beneficiary, they cite the case of *Bradley, supra,* decided by a divided court with a strong dissenting opinion, with which we have already dealt, and the only other case cited is the case of *Ramsey vs. United States,* 72 F. Sup. 613, from the District Court of the Southern District of Florida, the Jacksonville Division, July 31, 1947, within the Fifth Circuit. We assume that, if it were not for the fact that in the *Ramsey* case, *supra,* there was no evidence whatever of any overt act on the part of the insured soldier to change his beneficiary, no documents of any kind ever executed dealing with a

change of beneficiary, this court would not be impressed with the decision in the *Ramsey* case, *supra,* in the face of the two decisions by the Fifth Circuit Court, of which Florida is a part, in the *Mitchell* case, *supra,* and its opinion in the case at bar.

The District Court decided that the facts in the case at bar are controlled by the case of *Roberts v. United States, et al.,* 4th Circuit, 157 F. 2nd 906, cert. den. 67 S. Ct. 870, 330 U. S. 829, 91 L. Ed. 1278. (R-58.) The Circuit Court of Appeals in its opinion (R-83) as reported in 165 F. 2nd 761 thinks that the facts in the case at bar were controlled by the case of *Mitchell vs. United States,* 72 F. Supp. 352; 165 F. 2nd 758. For other cases where the holding is in line with the almost universal holding where certiorari has been denied by this court, we cite the case of *Collins vs. United States, et al.,* 10 Cir., 161 F. 2nd 64, cert. den. 67 S. Ct. 1756, 331 U. S. 859, 91 L. Ed. 1866.

As the case of *Claffy v. Forbes,* 280 Fed. 233, is a leading case on the questions of fact herein involved and has met with the widest possible approval by the Federal District and Circuit Courts throughout the United States, we quote from this case at length:

> "The insured may change the beneficiary in writing, signed by the insured, and witnessed by one person (Regulation 14, dated March 20, 1918). By amendment of this regulation dated February 24, 1919, the change may be made by notice in writing to the Bureau of War Risk Insurance, signed by the insured, or by his duly authorized agent, the change

to be effective when received and recorded in the War Risk Insurance Bureau. Under the regulations of February 24, 1919, if the insured had written to the bureau, supra, that upon the death of his mother, the beneficiary, to pay the unpaid installments to the niece, such designation would undoubtedly have been sufficient and if the mother during her lifetime had notified the bureau, supra, in writing, pursuant to the provisions of the letter, that upon her death the unpaid installments should be paid to the niece, the designation would have sufficed. The intent to designate the niece as residuary beneficiary is explicitly established. Does the fact that the designation was by misapprehension of the laws sent to the mother, instead of the bureau, defeat the soldier's intent and right granted him under the insurance contract and law?

"This inquiry must be answered in the negative. Is the designation made in harmony with the regulations at the time it was received by the bureau sufficient? Yes. The only purpose of the regulations, having relation to change of beneficiary, is to enlarge the right of the insured, and to protect the insurer. To hold the designation in the letter sufficient does not change the liability of the insurer, and is within the privilege granted the insured. The brothers and sisters of the deceased soldier have no right, except that of blood relationship, and all right is determined against them by the expressed designation by the deceased in harmony with the regulations at the time it was presented. The execution and receipt of designation must be taken together. It takes both to conclude the issue, and form, formality, and legal technicality must give way to common sense and remedial justice, when all doubt is removed as to the intent of the deceased soldier; and

when the purpose of the law has been complied with, there should be no hesitancy in carrying out the express wish of such deceased. The letter is a designation signed by the insured and the fact that it was sent to the mother to make the final designation, in the event of her death, instead of being sent to the bureau for record, should not defeat it.

"All that is necessary is that the real wish and purpose of the soldier, who exposed his life in the army for the safety of the government, should sufficiently appear (notes, Cooper's Justinian, p. 496, R. E.; Gifts Inter Vivos, Jaen-Marie Ricard, printed in Paris in 1754, p. 332.); nor is it vital that notice of designation should be received by the bureau prior to the death of the insured. The regulations of February 24, 1919 (paragraph 3), provide for such a contingency:

> " 'Before notice of such designation has been received and recorded by the bureau, payment shall be made to those entitled according to the laws of intestacy, as provided in section 402 of the War Risk Insurance Act.'

"Throughout the history of the civilized world, since the decrees of Julius Caesar, the intention and wish of the soldier, with relation to designation of beneficiary or disposition of property, killed in the line of duty, has been carried out when ascertained, whether it was scrawled in the sand with the point of his sword, or written on the scabbard of his sword or his shield (The Customs of Duchy of Burgundy, printed at Dijon, 1694, p. 410; Coutumes de Paris, column 51, Paris, 1714); and remedial justice requires, under the facts in this case, that the designation of the niece in the letter to the mother be established from the date of presentation to and record thereof by the Bureau of War Risk Insurance."

This is still the law according to the case of *Van Doren versus United States, et al.*, 68 Fed. Sup. 222, where it is held that the regulations for the change of beneficiary in National Service Life Insurance is identical in War Risk cases with those under National Service Life Insurance, and cites both provisions for comparison and also holds that the Government Insurance Report Form and Officer's Data Sheet need no explanation as they speak for themselves, and cites the cases of *Johnson v. White*, 8 Cir., 39 Fed. (2d) 793; *Claffy v. Forbes, supra; Steele v. Suwalski*, 7 Cir., 75 F. (2d) 885; *Farley v. United States*, 291 F. 238, in support thereof.

We cite the following cases to show that there is no lack of unanimity in the holding of the courts with the holding of the Fifth Circuit Court of Appeals in the case at bar:

Ambrose v. United States, 15 F. (2d) 52;
United States v. Sterling, 2 Cir., 12 F. (2d) 921;
Peart v. Chaze, (D. C.) 13 F. (2d) 908;
Margaret Elizabeth Roberts, Appellant, v. U. S. and Joe Johnson Roberts, Appellee, 157 F. (2d) 906;
Citron v. United States and Adelaide Rosenschien, 69 F. Sup. 830;
Woods v. United States, et al., 69 Fed. Sup. 760;
Walker v. United States, et al., 70 Fed. Sup. 422;
Collins v. United States, 161 F. (2d) 64 cert. den. 67 Sup. Court 1756;
Eggleston v. United States, et al., 71 Fed. Sup. 114;
Van Doren v. United States, et al., 68 Fed. Sup. 222;
Mitchell v. United States, et al., 165 F. (2d) 758, 5 Cir.;

White v. United States, 270 U. S. 175, 46 S. Ct. 274, 70 L. Ed. 530;
Gregg v. United States, 15 F. (2d) 8;
Kaschefsky v. Kaschefsky, et al., 110 F. (2d) 836;
Shroeder v. United States, 24 F. (2d) 420;
Shepherdson v. United States, 271 F. 330;
Chinchiarelli v. United States, 26 Fed. (2d) 484.

The insured soldier does not have to ask anybody to change his beneficiary for him because he has no access to nor control over the records on which the change is to be made. He only has to express his intention by designating in writing the one he prefers as beneficiary and sign the designation, identifying the insurance and the insured, and the rest is ministerial. When a soldier makes a designation in writing, which identifies his insurance and the insured, and signs same, it is binding on the Government when it reaches the Veterans' Administration, regardless of how it reaches the Veterans' Administration, whether it reaches the Veterans' Administration before or after the death of the insured, or whether the designation is made upon any particular form, Items 26 and 27 (R-50 to 54). It does not make any difference whether the designation, when so made by the insured soldier, is in the files of the War Department, or the files of the Veterans' Administration at the time of the death of the soldier, it takes effect from receipt by the Veterans' Administration and relates back to the date of its execution subject to previous payments made by the insurer.

The appellant bottomed her claim on the failure of the Veterans' Administration to require use of Form 336 by the insured in designating his change of beneficiary

from appellant to appellee, when according to Items 26 and 27 (R-50 to 54), Form 336 was not even available for change of beneficiary during the period of service by the insured in the case at bar. All acts and intentions of an unmarried insured soldier loses force and effect when he thereafter marries and assumes new and different obligations. *McKewen vs. McKewen, et al.*, 165 Fed. (2d) 761.

The Government Insurance Report Form and Officers' Data Sheet executed by the insured soldier in the case at bar on October 20, 1943, at Kearney, Nebraska, in which he designated a new beneficiary of his insurance evidently satisfied the soldier, the Veterans' Administration, until the mother so bitterly protested, the United States District Court, who tried the issue as to whether the said documents were sufficient to cause a change of beneficiary, the Circuit Court of Appeals in affirming the action of the District Court, the United States, as it did not appeal from the decree in the District Court; and evidently satisfied the appellant as being sufficient as a designation, because of her denial of the signature of her son on said documents.

Appellee feels that she has been unduly delayed by this continued litigation in the enjoyment of her rights as beneficiary of the insurance in the case at bar, and that she is entitled to some redress in the way of damages if the Court thinks proper to allow any.

The appellee humbly urges the Court to deny the Writ of Certiorari prayed for herein, for which she will ever pray.

S. M. GRAHAM,
Attorney for Mrs. Marjorie L. McKewen, Appellee.

I, S. M. Graham, attorney for appellee, hereby certify that I have mailed a true copy of the foregoing brief to Barnett, Barnett and Jones, and Garner W. Green, attorneys for appellant, at their usual place of residence, properly addressed with sufficient postage attached thereto, and deposited with the United States mail on this the .... day of ....., 1948.

S. M. GRAHAM,
Attorney for the Appellee.

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 812

MRS. LIBBYLEI GRAVES MCKEWEN, PETITIONER

v.

MRS. MARJORIE L. MCKEWEN AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This case involves a dispute between the petitioner, the mother of a deceased veteran, and respondent, his widow, as to the disposition of the proceeds payable by the Government under a $10,000 policy of life insurance issued to the deceased under the National Service Life Insurance Act. The widow originally filed a claim and received payments thereunder in the amount of

$935.60. Thereafter, the mother filed a claim contending that she was entitled to the proceeds. Since the mother was the last-named beneficiary under the policy and no communication had been received changing the beneficiary, the Veterans Administration held that the mother, and not the widow, was entitled to receive the proceeds of the policy.

Suit for the proceeds of the insurance was brought by the insured's wife against the mother and the Government in the United States District Court for the Southern District of Mississippi. The widow based her claim on an officer's data sheet, a government insurance report form, and a completed form similar to the data sheet filed by the insured upon reporting to his duty station overseas. Answering the complaint, the United States admitted its liability for the payment of $10,000 under the insurance contract, asserted its inability safely to pay the money by reason of the conflicting claims of the widow and mother, requested the court to determine to whom the proceeds of the insurance was due, and asked that it be given credit in any judgment for the amounts that it had theretofore paid to the widow of the deceased.

The district court entered judgment in favor of the widow for the amount of the policy less, however, the sum of $935.60, which had theretofore been paid to the widow. The judgment of the district court was affirmed by the court below. Inas-

much as the determination of the proper beneficiary in this case is essentially a factual one, and the Government has no interest in the controversy other than to pay the insurance admittedly due to the proper beneficiary, the Government in effect occupies the role of a stakeholder and therefore takes no position as to whether the writ of certiorari should issue.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1948.

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